FEB 4 1926
WM. R. STANSBURY
CLERK

United States of America

IN THE

Supreme Court

October Term, A. D. 1925

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,
v.
ALVIN R. DURHAM COMPANY and FRED S. LARSON, alias FRED M. LARSON,
Respondents.

No. 257.
Certiorari to the Supreme Court of Michigan.

BRIEF FOR PETITIONER

R. N. VAN DOREN,
SAMUEL H. CADY,
Counsel for Petitioner.

INTERSTATE BRIEF & RECORD CO., KERR BLDG., DETROIT

SUMMARY

Page

General Statement 1-3

The Case Involves a Federal Question..... 3

Statement of the Case..... 4-5

Specification of Error..... 5

Argument:

I. Under Michigan law the right to hold a garnishee liable depends upon the state of the claim, as one garnishable or not, at the time of the service of the process in garnishment..... 6

II. Prior to the decision in the Mark Owen case, interpreting section five of the bill of lading, the courts uniformly held that facts similar to those of this case constituted delivery..... 7-8

III. Section 5 of the bill of lading did not change the law as to what constitutes delivery of a carload of merchandise 9-10

IV. The decision in the Mark Owen case did not change the law as to delivery..... 11-12

V. The Supreme Court of Michigan placed an erroneous construction upon the decision in the case of Michigan Central Railroad Company v. Mark Owen & Company, 256 U. S. 427..... 12-14

VI. The various characteristics of the legal relationship recognized as commonly existing between the parties to a garnishment proceeding upon which liability to a plaintiff is predicated, negative the claim of liability in this case..... 14-17

Page

1. The garnishee must maintain the status quo of the property in its possession as of the time of the service of process..... 14
2. The garnishee is liable to the plaintiff only to the extent to which it is liable to the defendant 15
3. The purpose of garnishment is to reach property not subject to direct levy..... 16
4. In order to subject one to garnishment the property involved must be in the garnishee's exclusive possession 16

INDEX TO CITATIONS

Anchor Mill Co. v. Burlington, C. R. & N. R. Co., 102 Ia. 262; 71 N. W. 255..... 8
Ark Adelphia Mill Co. v. Smoker Merchandise Co., 100 Ark. 37; 139 S. W. 680..... 8
Bank v. Williams, 112 Mich. 564..... 6
Bethel v. Judge of Superior Court, 57 Mich. 379; 24 N. W. 112 6
Case v. Dewey, 55 Mich. 116; 20 N. W. 817..... 6
G. F. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190... 3
Hitchcock v. Miller, 48 Mich. 603; 12 N. W. 871..... 6
Hopson v. Dinan, 48 Mich. 612; 12 N. W. 875..... 6
Kenny Co. v. Atlanta & W. P. Railroad Co., 122 Ga. 365; 50 S. E. 132..... 8
Martz v. Detroit Fire & Marine Ins. Co., 28 Mich. 201.. 6

Page

Michigan Central Ry. Co. v. Mark Owen & Co., 256 U. S. 427 ..... 3, 11, 12
Michigan Garnishment Statute (Sec. 13122-67, C. P. 1915, Vol. 3) 6
N. Y. C. & H. R. R. Co. v. York & Whitney, 256 U. S. 406 3
Paddock v. Toledo & O. C. R. Railroad Co., 21 Ohio C. C. 626 8
Rothchild v. Northern Pac. Railroad, 68 Wash. 527; 123 Pac. 1011; 40 L. R. A. (N. S.) 773, and note 7
4 Ruling Case Law, 824 8
Southern R. Co. v. Barclay, 1 Ala. 167; 41 Am. Rep. 749 8
Southern R. Co. v. Prescott, 240 U. S. 632 3
South & North Ala. R. Co. v. Wood, 66 Ala. 167; 41 Am. Rep. 749 8
Vaughn v. New York, N. H. & H. R. R., 27 R. I. 235; 61 Atlantic, 695 8
Whitney Mfg. Co. v. Richmond & D. R. Co., 38 So. Car. 365; s. c. 17 S. E. 147 7
Yazoo & M. V. R. R. Co. v. Nichols, 256 U. S. 540 3

United States of America

IN THE

Supreme Court

October Term, A. D. 1925

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Petitioner, v. ALVIN R. DURHAM COMPANY and FRED S. LARSON, alias FRED M. LARSON, Respondents.	No. 257. Certiorari to the Supreme Court of Michigan.

BRIEF FOR PETITIONER

This case is here on writ of certiorari to the Supreme Court of Michigan. The judgment sought to be reviewed is dated December 31, 1924. A copy is printed on page 16 of the transcript of record.

The case was twice passed upon by the Supreme Court of Michigan. The first decision is reported in *224 Mich. 477, 194 N. W. 1014;* the second in *229 Mich. 468, 201 N. W. 503.*

The case involves an interpretation of the petitioner's liability as a garnishee under Section 5 of the uniform bill of lading with reference to an interstate shipment, and was decided by the lower court upon the authority of the decision of this court in *Michigan Central Ry. Co. v. Mark Owen & Co., 256 U. S. 427.*

The claim advanced by the plaintiff, and sustained by the Supreme Court of Michigan, upon which this Court's jurisdiction is invoked, is as follows:

That where goods shipped on an order bill of lading in interstate commerce have been surrendered to the notify party after he has presented the carrier with the order bill of lading which has been duly paid for by him, has paid the freight charges and receipted to the carrier for the entire shipment covered by the bill, and has unloaded a substantial portion of such shipment, the remainder not so unloaded, remained in the custody, possession and under the control of the carrier so as to render it liable as garnishee of the owner of the goods then in process of being unloaded by him (Rec. 12-16).

In opposition to the claim of the plaintiff, the garnishee (petitioner) contended that for the purposes of the garnishment proceeding it must be held that at the time of the service of the writ the possession of the entire carload of apples had passed from the carrier to the notify party; that the delivery of the bill of lading, payment of freight charges, execution of a receipt for the entire carload, and the actual opening and entry of the car and exercise of complete dominion thereover in the unloading of a substantial part of the contents of the car, created a situation which, as a matter of law, relieved the garnishee of all liability as such, because it

did not have the property thus surrendered to the notify party, in its possession and under its control, at the time of the service of the writ (Trans. p. 12).

The Supreme Court of Michigan in sustaining plaintiff's contention based its decision on the *Mark Owen case,* holding that the interpretation of Section 5 of the uniform bill of lading made by this court in that case was sufficiently broad to require the adjudication made.

THE CASE INVOLVES A FEDERAL QUESTION

The shipment being interstate, and therefore subject to and governed by the laws of Congress and the decisions of the Federal Courts; a question of law having arisen and been determined upon the provisions of the uniform bill of lading; and the State Supreme Court having applied thereto what it considered the controlling decision of the Supreme Court of the United States, a federal question is involved.

So. Ry. Co. v. Prescott, 240 U. S. 632;
G. F. & A. Ry. Co. v. Blish Milling Co., 241 U. S. 190;
N. Y. C. & H. R. R. Co. v. York & Whitney, 256 U. S. 406;
M. C. R. R. v. Mark Owen & Co., 256 U. S. 427;
Yazoo v. M. V. R. R. Co. v. Nichols, 256 U. S. 540.

STATEMENT OF THE CASE

This controversy arose in garnishment proceedings brought by the respondent Durham Company (hereinafter called the plaintiff) against the petitioner under the Michigan Garnishment Statute (Sec. 13122-67, C. L. 1915), in an action in which the respondent Larson was defendant. In the proceedings below Larson and the petitioner were known as principal defendant and garnishee defendant respectively, and will, for convenience, be referred to herein as defendant and garnishee respectively.

A carload of apples was shipped from Ludington, Michigan, via Manitowoc, Wisconsin, to Ironwood, Michigan, where it arrived on the 7th of October, 1921, at four o'clock in the afternoon (Trans. 8, 12). The shipment moved under an order bill of lading, and was billed to the order of shipper, notify Fred M. Larson, the defendant. The following morning at eight o'clock the defendant presented the original order bill of lading to the garnishee, which bill bore the proper endorsement showing that the defendant had paid the Bank at Ironwood for the shipment, and that he was, by virtue of ownership of the order bill of lading, the owner of the contents of the carload of apples. The defendant delivered this bill of lading to the garnishee's agent, paid the freight charges of $116.16 on the shipment, and gave to the said agent his receipt for the entire shipment (Trans. p. 12). The car containing the shipment was then on a team track where defendant could drive to it for unloading. Immediately thereafter, or at about eight o'clock the same morning, the defendant commenced unloading the apples from the car, and at 9:45 that morning the writ of garnishment was

served upon the garnishee's agent. In the meantime defendant had gone to the car with a drayman and auto truck. They entered the car, put apples in baskets and carried them out. The defendant was in or about the car from the time he opened it until the writ in garnishment was served, and during that time he had unloaded one-fourth of the apples from the car.

SPECIFICATION OF ERROR

The Supreme Court of the State of Michigan erred in not reversing the decision of the trial court and directing the dismissal of the proceedings as to the garnishee defendant.

ARGUMENT

I.

UNDER MICHIGAN LAW THE RIGHT TO HOLD A GARNISHEE LIABLE DEPENDS UPON THE STATE OF THE CLAIM, AS ONE GARNISHABLE OR NOT, AT THE TIME OF THE SERVICE OF THE PROCESS IN GARNISHMENT.

The *Michigan Garnishment Statute (Comp. Laws 1915, Vol. 3, Sec. 13122, p. 4634)* requires of plaintiff an affidavit stating that he has good reason to believe that the garnishee "* * * has property, money, goods, chattels, credits or effects in his hands or under his custody or control belonging to the defendant * * *."

As a condition precedent to plaintiff's right to maintain the garnishment action the garnishee must have in its hands or under its custody or control property belonging to the defendant. This possession, custody or control must exist at the time of the service of the process in garnishment.

Bank v. Williams, 112 Mich. 564;
Martz v. Detroit Fire & Marine Ins. Co., 28 Mich. 201;
Hitchcock v. Miller, 48 Mich. 603; 12 N. W. 871;
Hopson v. Dinan, 48 Mich. 612; 12 N. W. 875;
Case v. Dewey, 55 Mich. 116; 20 N. W. 817;
Bethel v. Judge of Superior Court, 57 Mich. 379; 24 N. W. 112.

II.

PRIOR TO THE DECISION IN THE MARK OWEN CASE, INTERPRETING SECTION FIVE OF THE BILL OF LADING, THE COURTS UNIFORMLY HELD THAT FACTS SIMILAR TO THOSE OF THIS CASE CONSTITUTED DELIVERY.

Whitney Mfg. Co. v. Richmond & D. R. Co., 38 So. Carolina, 365; s. c. 17 S. E. 147. In this case it appeared that a railroad company had transported a carload of cotton to the place of delivery in safety; that the car was placed on a sidetrack at the request of plaintiff, and for its convenience; that the waybill had been delivered to the defendant as a receipt, and that plaintiff had removed a portion of the cotton. It was held that this constituted a delivery of the contents of the car.

Rothchild v. Northern Pac. Railroad, 68 Wash. 527; 123 Pac. 1011; 40 L. R. A. (N. S.) 773, and note.

On the question of delivery in this case the opinion of the court states:

> "As we view the facts there was an actual delivery of the property to the consignee immediately preceding its destruction, and that the defendant's liability to the appellant at that time was neither that of a carrier nor a warehouseman. Not only had the bill of lading been surrendered and the car been spotted on the defendant's delivery tracks for delivery before the fire occurred, but the plaintiff's agents had actually reached the car with teams, had broken the seal of the car and had opened and entered it for the purpose of removing the property. This clearly constitutes a delivery. There was not only a surrender of the right of possession of the property by the defendant, but there was an actual taking of the property

by the plaintiff. Delivery could have been no more complete had the wagons been actually loaded and started on their way to plaintiff's warehouse."

To the same effect see also:

Kenny Co. v. Atlanta & W. P. Railroad Co., 122 Ga. 365; 50 S. E. 132;

Ark Adelphia Mill Co. v. Smoker Merchandise Co., 100 Ark. 37; 139 S. W. 680;

Vaughn v. New York, N. H. & H. R. R., 27 R. I. 235; 61 Atlantic, 695;

Paddock v. Toledo & O. C. R. Railroad Co., 21 Ohio C. C. 626;

Anchor Mill Co. v. Burlington, C. R. & N. R. Co., 102 Ia. 262; 71 N. W. 255;

South & North Ala. R. Co. v. Wood, 66 Ala. 167; 41 Am. Rep. 749;

Southern R. Co. v. Barclay, 1 Ala. App. 348; 56 So. 26;

4 R. C. L. 824.

These decisions were rendered before the uniform bill of lading became operative, and before the decision of this court in the *Mark Owen case* construing the provisions of the bill of lading.

III.

SECTION 5 OF THE BILL OF LADING DID NOT CHANGE THE LAW AS TO WHAT CONSTITUTES DELIVERY OF A CARLOAD OF MERCHANDISE.

The only change made in the law, if any, as to what constitutes delivery is accomplished by reason of Section 5 of the bill of lading, which reads as follows:

> "*Sec. 5.* Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carriers' responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.
>
> The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held for forty-eight hours (exclusive of legal holidays), for loading or unloading and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage."

There is nothing in this section which can be construed as a modification of the law of delivery; it only modifies the law as to the carrier's liability for property not removed within forty-eight hours, making it an insurer as to such property.

If there was not delivery by the garnishee to the defendant at the time the defendant paid the freight charges, delivered the order bill of lading, receipted for the contents of the car and commenced unloading them, then it is hard to conceive what change in the legal status of the parties had taken place. Before these transactions the defendant had no right to the possession of the contents of the car. Immediately thereupon he had exclusive right thereto, *even as against the carrier garnishee.* The latter's right to exercise control over the property had ceased. The defendant had the right to open the car, inspect its contents, remove a part and reconsign the remainder; he could sell the apples to one or many customers, fixing the price, or give them away; he could remove them all within an hour after the transaction recited or could take out a few barrels a day each day for a month (subject to charges for demurrage).

The plaintiff predicates possession upon the carrier's liability during the forty-eight hour period. If, after the recited transactions had occurred, more than forty-eight hours had expired before the service of process in garnishment, it would not be seriously contended that the remaining apples were in the possession of the garnishee. The garnishee's liability as an insurer would then have expired. But the passing of the forty-eight hours would not constitute delivery if the property had not been delivered before.

IV.

THE DECISION IN THE MARK OWEN CASE DID NOT CHANGE THE LAW AS TO DELIVERY.

In the case of *Michigan Central Railroad Co. v. Mark Owen & Co., 256 U. S. 427, at 432,* where a portion of the contents of a car of grapes had been unloaded, and loss by pilfering occurred after the unloading had commenced, this court said:

> "The property here was not delivered; access was only given to it that it might be removed, and forty-eight hours were given for the purpose. Pending that time it was within the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and had during its transportation."

This lanugage should be read having in mind that the court was considering Section 5 of the bill of lading as to the liability of the carrier for loss occurring during the forty-eight hour free time and before removal of the goods from a car. That was the sole question before the court, and it was not intended that the language used should have general application.

Prior to the adoption by the carriers of the uniform bill of lading their liability for loss ceased upon the delivery of the goods. By this decision this court has construed the provisions of the bill of lading as continuing this liability for forty-eight hours after giving notice to the consignee of the arrival of the car. But the bill of lading does not change the law as to the facts which constitute delivery. It simply extends the liability of the carrier as to the goods "not removed" from the car. Delivery of the goods in the sense of

the surrender of possession, the surrender of the carriers' lien, the surrender of custody or control, is not inconsistent with such liability.

The sole question considered by the court was one arising out of the contract relations of the parties and involved the liability of the carrier to the consignee upon and by reason of such contract.

The effect of the decision was to place upon the carrier the duty of policing and protecting cars in process of unloading, and for failure to do so a liability was created. In order to hold the carrier liable it was not necessary to hold what the quoted language, taken literally, seems to indicate. The purport of the language will properly be restricted in its scope to the query then under consideration, to-wit: the liability of the carrier before the removal of merchandise from a car.

V.

THE SUPREME COURT OF MICHIGAN PLACED AN ERRONEOUS CONSTRUCTION UPON THE DECISION IN THE CASE OF MICHIGAN CENTRAL RAILROAD COMPANY v. MARK OWEN & COMPANY, 256 U. S. 427.

On the first appeal of this case to the Supreme Court of Michigan, after referring to and quoting from the *Mark Owen case,* that court said:

> "If the Railway Company be liable as carrier it must also follow that the apples remaining in the car before the expiration of that period are within the custody, control and possession of the carrier. We are impressed that under the foregoing construction of Section 5 we must hold that defendant railway had

property in its custody and under its control belonging to the principal defendant when the summons was served."

(224 Mich. 477; 194 N. W. 1014.)

This is carrying the effect of the decision in the *Mark Owen case* far beyond its proper scope, and outside of any issue that was or could have been decided in that case. It does not follow that because "the Railway Company be liable as carrier" during the forty-eight hour period, property not removed from the car remains in its "custody, control and possession."

The bill of lading provision places the duty upon the company of policing the property during such period which is not inconsistent with delivery having theretofore been accomplished, and is not a necessary concomitant of "custody, control or possession." As before stated, the language in the *Mark Owen case* was used in relation to the privity existing between carrier and consignee under their contract. It was said with relation to the *liability* of the carrier to the consignee.

In the case at bar everything the carrier could do to effect delivery had been done. The defendant was the absolute and undisputed owner of the goods and entitled to the possession and control thereof, and was exercising such possession and control. The carrier garnishee had no right to disturb or interrupt the defendant in his unloading of the shipment. Had it attempted to do so it would have been a trespasser. Yet to support the judgment of the Supreme Court of Michigan the carrier garnishee must be held to have been under the necessity of committing such a trespass. If liable as garnishee how could it have proceeded to get actual posses-

sion of the goods for which it is so held liable? Could it be by trespass? Certainly not by any possessory process, for, as between the carrier garnishee and the defendant, the latter was the owner and entitled to the possession of the goods, and at the instant was exercising domination, custody and control over them.

VI.

THE VARIOUS CHARACTERISTICS OF THE LEGAL RELATIONSHIP RECOGNIZED AS COMMONLY EXISTING BETWEEN THE PARTIES TO A GARNISHMENT PROCEEDING UPON WHICH LIABILITY TO A PLAINTIFF IS PREDICATED, NEGATIVE THE CLAIM OF LIABILITY IN THIS CASE.

Some of these characteristics are as follows:

1. The garnishee must maintain the *status quo* of the property in its possession as of the time of the service of process.

2. The garnishee is liable to the plaintiff only to the extent to which it is liable to the defendant.

3. The purpose of garnishment is to reach property not subject to direct levy.

4. In order to subject one to garnishment the property involved must be in the garnishee's exclusive possession.

1. The garnishee must maintain the status quo of the property in its possession as of the time of the service of process.

A garnishee is expected to maintain the *status quo* of property in its possession as of the time of the service of process.

It is not expected or required to do anything more than to maintain the custody, possession and control which it has at such time. But in the instant case, if the garnishee is to be held liable, upon the service of the process in garnishment, it was charged with the duty of performing positive acts to undo what it had theretofore done by way of relinquishing possession; it must repossess itself of the apples. In substance, it had said to the defendant: "You now have possession of this carload of apples," and the defendant had recognized the transfer of such possession by signing a receipt for the same and proceeding with the work of unloading. Garnishees are not required to answer for goods not in their hands or under their custody or control at the time of the service of process. The service of process inhibits acts relinquishing possession thereafter, but, if the garnishee is to be held liable in this case, it is not because of any subsequent relinquishment of possession, but rather because it failed to repossess itself of the apples, the possession of which it had theretofore relinquished. Or, to put it differently, it is not attempted in this case to make the garnishee liable for relinquishing possession after service of process, but rather to make it liable for failure to repossess itself after such service. The only liability of the carrier garnishee to the defendant at the time of the service of process was a contingent one depending upon its failure to properly police the property in question during the forty-eight hour period.

2. The garnishee is liable to the plaintiff only to the extent to which it is liable to the defendant.

If, as is commonly stated in the cases, the garnishee is liable to the plaintiff only to the same extent to which it would be liable to the defendant, then there can be no liability here, as the defendant could make no claim against the

garnishee. The goods in question were then subject to his domination, and he was exercising possessory rights over them.

3. The purpose of garnishment is to reach property not subject to direct levy.

This property was subject to direct levy on execution against the defendant. The carrier garnishee had no further interest in it. Its lien had been discharged by the payment of the freight charges. The defendant's evidence of ownership, the bill of lading, had been surrendered to the garnishee. If an officer had made a direct levy upon the apples no claim could have been interposed by the carrier garnishee.

4. In order to subject one to garnishment the property involved must be in the garnishee's exclusive possession.

The garnishee had no right whatever to exercise any control over the apples. The defendant had the unquestioned authority to proceed with their unloading. The domination which the defendant was legally exercising over the apples evidenced a control over them inconsistent with exclusive possession in the garnishee.

The decision of the Supreme Court of Michigan misconstrued and misapplied the doctrine of the *Mark Owen case (256 U. S. 427)*, and by its judgment subjected the garnishee, petitioner herein, to a liability for which it is in no way responsible, and for relief from which it has no recourse of escape. It applied a rule based upon contract to the advantage of a third party with whom petitioner had no relations, contractual or otherwise, and made petitioner respond in a

substantial sum to such party, when, under the *Mark Owen case,* it was not liable even to the consignee under the facts in this case. This conclusion and decision, was palpably erroneous.

We submit that the decision of the Supreme Court of Michigan should be reversed.

R. N. Van Doren

Jeremiah Lady

Counsel for Petitioner.

FEB 14 1925
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. [redacted] 1925

No. [redacted] 257

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

VS.

ALVIN R. DURHAM COMPANY, AND FRED S. LARSON, ALIAS FRED M. LARSON,

Respondents.

OBJECTION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN WITH STATEMENTS OF FACTS AND ARGUMENT

JULIUS J. PATEK,
Counsel for Respondent,
Alvin R. Durham Company.

MYRON H. WALKER,
SOLOMON W. PATEK,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1924.

No. 866

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

ALVIN R. DURHAM COMPANY, ET AL.,
Respondents.

OBJECTION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN WITH STATEMENTS OF FACTS AND ARGUMENT

And now comes said Respondent, Alvin R. Durham Company, and objects to the Petition for Writ of Certiorari to the Supreme Court of Michigan, and the granting of any relief to Petitioner herein, for all of the reasons hereinafter contained and set forth.

I.

STATEMENT OF CASE

Garnishment proceedings brought in the Circuit Court for the County of Gogebic, Michigan, October 8th, 1921.

Verdict and judgment was entered in favor of the garnishee defendant, Petitioner herein, and against the plaintiff, Respondent, Alvin R. Durham Company, December 19th, 1921, and on October 1st, 1923, the Supreme Court of the State of Michigan reversed the decision of the Circuit court and granted a new trial. (Durham vs. Chicago & Northwestern Railway Company, 224 Mich. 477; 194 N. W., 1014). Thereupon, the garnishee defendant, Petitioner herein, filed a motion for re-hearing and brief in support thereof, which said motion the Michigan Supreme Court denied December 20th, 1923, whereupon Petitioner filed a petition for a writ of certiorari in this Court, together with a brief in support thereof presenting all the issues and urging all the points heretofore and now urged in this Court. On April 28th, 1924, this Court denied the application for certiorari for lack of jurisdiction, because no reviewable final judgment was rendered by the Michigan Supreme Court, a new trial having been granted. 44 Sup. Ct. 455. The cause was re-tried in the Circuit Court of Gogebic County, Michigan, on May 23rd, 1924, on the same record and state of facts as before, and the trial court directed a verdict for respondent, Alvin R. Durham Company, whereupon, petitioner herein removed the case to the Michigan Supreme Court, and all and the identical issues and legal propositions here urged, were orally argued at length and written briefs thereon submitted for a third time, to said Court, which, on December 31, 1924, again entered judgment in favor of respondent herein. (201 N. W. 503).

The issue in the case being between the plaintiff-respondent, Alvin R. Durham Company, and the railway company, garnishee defendant-petitioner, and involves petitioner's liability as garnishee-defendant of Larson, for the value of about three-quarters of a carload of apples, an

interstate shipment, to the amount of Six Hundred Dollars (2-3).

(These references are to the printed pages of the printed Record of the Michigan Supreme Court, a copy of which has been certified to this Court.)

The garnishee filed its disclosure, denying all liability; a statutory issue was framed by stipulation (17, 18-25), and was heard in part upon evidence both, oral and written (1-7, 11-20, 22-25), and in part upon a statement of counsel for garnishee, as modified and agreed to in open court (20-22). The trial court was informed that the plaintiff seeks to hold the garnishee on an interstate shipment under the federal law, and not under the state law (7), and thereupon it was stipulated that no question of fact was involved in the case and that the court might dispose of the same as a matter of law and at the conclusion of the testimony plaintiff moved the court to direct a verdict in favor of plaintiff and against the garnishee defendant, said motion being based upon the record made and the former decision of the Michigan Supreme Court in this cause. (25).

Upon the record as thus made, and the decision of the Supreme Court the trial Court directed a verdict in favor of the plaintiff and against the garnishee defendant in the sum of $678.75 damages, which includes interest, and the costs to be taxed. (26). The garnishee defendant asks this Court to review the judgment of the Michigan Supreme Court, affirming said judgment of the Circuit Court.

II.

STATEMENT OF FACTS

The plaintiff-respondent is a judgment creditor of the defendant Larson, having obtained judgment against him in said trial court, on the 30th day of November, 1921, for

the sum of $1,099.00 damages and costs taxed at $25.10 (3, 14-15).

On the 4th day of October, 1921, there was billed by L. G. Jebavy, shipper, received and receipted for by the Pere Marquette Railroad Company, at Ludington, Michigan, a car load of apples in bulk, consigned to the order of the shipper at Ironwood, Michigan, "Notify F. M. Larson" shipped on an "Order Bill of Lading" and routed and shipped, "P. M. Ferry to Manitowoc, and Northwestern," "Destination, Ironwood" (12-14). This car arrived over the Chicago and Northwestern Railway at its yards in Ironwood, Michigan, during the afternoon of October 7th, (20-21), and notice of its arrival was given to F. M. Larson. The next morning about 8 o'clock, October 8th, the principal defendant Larson, presented at the freight office of the company at Ironwood, the original, "Order Bill of Lading" duly stamped by the Merchants and Miners State Bank, Ironwood, Michigan, "Paid Oct. 7, 1921" (13, 21), surrendered it to the Railroad Company, paid the freight charges on the carload of apples and signed the usual receipt therefor (21). The car was then on the "team track," one of the 'public delivery tracks" of said Railway Company at this station used for unloading freight received in car load shipments, but not connected in any manner wth the railway freight warehouse (2). Larson commenced unloading the car at about 8:20 in the morning of that day (24). On the same day (the 8th of October), the plaintiff sued out of said Circuit Court the writ of garnishment against the Railway Company, and the writ was duly served at the hour of 9:45 o'clock in the forenoon, upon said garnishee defendant (21,23).

At the time of such service of the writ the defendant Larson had unloaded about "one quarter of the apples" from the car (21) and thereafter, and notwithstanding

the garnishment, defendant Larson was permitted by the garnishee defendant to continue the unloading and completed the same on the 12th day of October,*four days after the service of the writ* (23).

While the car was being thus unloaded, and both, before and after the service of the writ, it was switched or shifted from place to place by the garnishee Railway Company (6, 23); on the morning of the 8th, it was first placed at the "final end" of the track northerly of the ware-house (23), and afterward moved easterly (23) past the switch and another car placed ahead of it so it became the second car on the track (23). It was switched or shifted one or more times after the unloading was begun (6), and on each occasion as will appear from the map (Ex. 1) it must have been moved beyond the switch, some 500 feet from where it had been previously placed for unloading. The car—a box car—was locked nights by the principal defendant, but this was after the service of the writ of garnishment, and no watchman was provided by him (6).

The Bill of Lading, Exhibit 2, (12-14), is the uniform "Order Bill of Lading" prescribed for interstate shipments of freight (2) and Sections 5 and 10 of its "Conditions" are set forth in full (13-14). Section 5 is as follows:

> Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other

lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage. * * * (13-14).

Certain of the rules and regulations relating to charges of demurrage, the collection and payment thereof, the lien of the carrier upon such property for such charges and the right of the carrier to retain the same until such charges are paid, are set forth in full in the record (4-5) and are as follows:

Item 3, Rule 1, Sec. A: "Cars of either railroad or private ownership, held for or by consignors or consignees for loading, unloading, forwarding directions or for any other purpose (including cars held for loading company material unless the loading is done by the railroad for which the material is intended and on its tracks) are subject to these demurrage rules, except as provided in Section B."

Item 4, Rule 2, Sec. A, subdivision a and b: Section A: "Forty-eight hours (two days) free time will be allowed for loading or unloading all commodities. (See rule 2, Section B, Paragraph 4.)"

"Unloading" includes:

"(a) Surrender of bill of lading on shipments billed 'to order.'"

"(b) Payment of lawful freight charges when required prior to delivery of the car."

Item 5, Rule 3, Sec. B: "On cars held for orders, surrender of bill of lading or payment of freight charges, whether such cars have been placed in position to unload or not, time will be computed from the first 7:00 a. m. after the day on which notice of arrival is sent or given to the consignee or party entitled to receive the same."

Item 9, Rule 7, Sec. A: "On cars not subject to Rule 9 (Average Agreement): After the expiration of free time allowed the following charges per car per day, or fraction of a day, will be made until car is released:

For each of the first four days, $2.00.

For each succeeding day, $5.00."

The map or plat before referred to, introduced and marked Exhibit 1, (11) is attached to the return of the writ of error to the Michigan Supreme Court, and shows the location of the "public delivery track" northerly of the freight ware-house, upon which the car was placed for unloading and upon which it was located at the time of the service of the writ, and also the relation of such track to the freight warehouse and the distance from the terminus of such track to the first switch easterly of such warehouse (11). It was stipulated that Manitowoc, through which the shipment was routed and passed, is in the State of Wisconsin, and, as is well known, is the terminal port of one of the Pere Marquette Car Ferry routes from Ludington, Michigan.

III.

ARGUMENT

A.

Counsel for the garnishee defendant-petitioner herein again include in their Petition and Brief, purported statements of fact which we cannot let pass unchallenged, and

in fairness, we again point out certain inaccuracies. We challenge the statement that after Larson's entry of the car there was an "exercising of complete dominion" thereover by him (Petition p. 5), and likewise the statement that there is no other decision where a railway company has been held liable as a garnishee under the same or similar circumstances, and particularly "after having surrendered *actual possession and control* and having done everything in its power to turn the shipment over to the consignee", (Petition p. 7), as well the statement that Larson "took possession of the car", and "was continuously in possession of the contents of the car and actually and actively engaged in unloading it from that time until the car was wholly unloaded", (Petitioner's brief p. 15), and likewise the statement that the carrier "was no longer in possession of the shipment" (Petitioner's brief p. 16), and the statement, "No construction or application of the Owen case (256 U. S. 427) can possibly subject petitioner to liability as garnishee while the owner and consignee of the shipment is in *actual and exclusive possession* thereof, and when there is no proof or claim of any circumstances giving rise to the exercise of any custody of the goods by the carrier. No occasion existed for an assumption of possession or control by petitioner, for the consignee was in *possession* and unloaded and *took delivery* of the entire contents of the car," (Petitioner's brief p. 17),—as to the fact of "possession" either "physical" or otherwise, of the car and of the apples by Larson. These statements of counsel are not supported by the record (20-22). Included by counsel as a part of his statement before the judge upon the examination (20-22), they were not accepted, but expressly disagreed to by plaintiff-respondent's counsel (22). And the fact is, Larson, after surrendering the bill of lading, paying freight and giving receipt (21), "started to unload the car" (6-7). He "hired a drayman with truck" (6),

"put them" (the apples) in baskets and carried them out" (6) and Larson says he was "there from the time we opened the car until the summons was served" (6), and "wasn't there all the time while they were moving the apples" (6), and he "knows the car was shifted around during the time it was there" (6). And the station agent says, "It must have been moved after they started to unload the apples, evidently, yes" (7). And this is the only foundation in the record for counsel's assertion of possession or control of car or of apples in Larson when the writ was served.

And so far from the record showing, as asserted by counsel, that either the car or the apples were "in the physical possession" of Larson, the fact, as we submit, is, that both the car and the apples were in the "possession" both "physical" and actual, and "under the control" of the garnishee railway company, at the time of the service of the writ, and that, in the language of the United States Supreme Court, in the Mark Owen case, *infra*, "access was only given to it" (the property) "that it might be removed," by the consignee.

The garnishee-petitioner, treats as unimportant the moving of the car during the process of unloading, by said railway company in its switching operations, and finally assumes, mistakenly as we show later, that there had been an actual "delivery" of the apples to Larson before the service of the writ, and to support this assumption contends, that "delivery" of the shipment here, has a different content and meaning from "delivery" of the shipment, as used in the Mark Owen case, *infra*, under almost precisely the same circumstances, in which this court says of the freight (grapes) there, "*the property here was not delivered*, access was only given to it that it might be removed, *it was within the custody of the railroad company*".

B.

The bill of lading, and the rules and regulations subject to which it is issued and accepted, constitute the contract between the parties, the carrier, the shipper and the consignee, and necessarily limit and govern their rights in the shipment and the rights of those claiming under them, and it is well settled, that the liability of the garnishee in respect to the property in his hands is governed and must be determined by such contract and can neither be enlarged, restricted, modified nor impaired as to the garnisheeing creditor and his rights.

The shipment in this case was billed and routed and necessarily was transported through the State of Wisconsin and it thereby became an interstate shipment, though initiated and terminating at points in the State of Michigan.

U. S. v. Delaware, etc., R. R., 152 *Fed.*, 269, 271;
U. S. V. Erie, etc., R. R. 166 *Fed.*, 352, 355;
U. S. v. Moynihan (*C. C. A.*, 3*rd*), 258 *Fed.*, 529;
Yohn, v. U. S. (*C. C. A.*, 2*nd*), 280 *Fed.*, 511;
Hanley v. Kansas City, etc., 187 *U. S.*, 617;
47 *L. Ed.*, 333; 23 *Sup. Ct. Rep.*, 214.

And as the shipment and transportation was interstate, and the contract between the parties thereto was made therefore under the federal law and regulations, it follows that the construction of such contract, and the rights of the parties under it are governed and to be determined by the decisions of the Federal Supreme Court, and such decisions will be followed as to such contract and rights by this Court.

Show Case Co. v. Telegraph Cable Co., 215 *Mich.* 30, 33, 34; 183 *N. W.* 731.

Ginsberg v. Railroad Co., 219 *Mich.*, 672-673; 189 *N. W.* 1018.

It is, therefore, the contention of the plaintiff respondent, that the rights of the parties in this case, fixed as they are by the contract of shipment, are settled, and this case governed by the recent decision of the United States Supreme Court, in the case of *Michigan Central Railway Company v. Mark Owen Co.*, already referred to, 41 *Sup. Ct. Rep.*, 554; 256 *U. S.*, 427.

In that case this Court construed Section 5 of the "Conditions of the uniform bill of lading, which *in haec verba* is Section 5 of the "conditions" of the Bill of Lading in this case (Pl. Ex. 2, Rec. p. 13-14), and there held that such bill of lading is a contract between the transportation company and those interested in the shipment, and that under said section 5, pending the 48-hour period, the shipment was "in the custody of the railroad company, the company having the same relation to it that the company acquired by its receipt and transportation" (Ibd. 556).

And it held, quoting from the syllabus, that, "Under the provisions of the uniform bill of lading that property not removed within 48 hours after notice of its arrival may be kept in car, depot, or place of delivery, subject to the carrier's responsibility as warehouseman, etc., the carrier's liability, as carrier, continues during the 48 hours *unless the property is removed within the time*, though the car is accepted by the consignee, the seals broken and the unloading commenced." And further, "Where a car on arrival at destination is placed on a public delivery track, and notice given the consignee, who accepted the car, broke the seals and started to unload, *there was no delivery of the property still in the car, but only the right of access given to it, in order that it might be removed*" (Ibd. 554).

As in the case at bar, the shipment there was interstate, upon an order bill of lading, the consignee (order-indorsee) had surrendered the bill of lading, paid the freight charges, receipted for the shipment, *broken the car seals* and commenced unloading, and had the shipment partly unloaded. "The loss, whatever it was," for which the Mark Owen Co., sought to hold the railroad company liable, "occurred after the acceptance of the cars and their unloading had commenced" (Ibd. 555), and as stated by the court, "whether the railroad company is liable therefore, and in what capacity liable—whether as carrier or warehouseman or at all—is the question in the case" (Ibd. 555). And answering this question, the Court, as we have seen, *hold that no delivery of the shipment to the consignee had been made,* that the relation of carrier continued and, therefore, the railroad company was liable for the loss of the freight (grapes) in the car occurring within the 48-hour period, though negligence of the railroad company had not been shown (Ibd. 556). And in so holding, this Court said, *"The property here was not delivered, access was only given to it that it might be removed,* and the 48 hours was given for that purpose. *Pending that time it was within the custody of the railroad company,* the company having the same relation to it that the company acquired by its receipt and had during its transportation" (Ibd. 556). As this finding of the Court, that the property had not been delivered, and access only given to it that it might be removed, and that pending such removal within the 48 hours, "it was within the custody of the railroad company," is the decisive point and the very gist of that case, so it is in this case, and is therefore exactly in point and decisive in this as to non-delivery to Larson, and the custody of the shipment by the railroad company pending the 48-hour period and at the time of the garnishment, and we submit is therefore decisive of the case at bar.

To hold otherwise in this case would, we submit, be utterly inconsistent with and contrary to the decision in the *Mark Owen case*, and that decision is authoritative and conclusive.

It is absurd to say, as does the garnishee defendant in this case, that the railroad company had delivered the goods and parted with all possession and control, and all right in that regard, when at the same time the railroad company is held to all the care, risk and liabilities of a carrier, or insurer, in case of theft or other loss of or damage to the goods in the meantime because they still remain "within the custody of the railroad company" as is held in the *Mark Owen case, supra*. The two propositions are utterly inconsistent and cannot stand together, and it makes no difference that this continuing risk and liability as carrier is held to be in a sense contractual, or rather left by the provisions of Section 5 of the bill of lading to the common law liability. Certainly the possession and control of the goods by the carrier must be and in the case at bar was as complete and full as its liabilities and risk is great. They must be and we submit *are co-extensive and plenary.*

We respectfully quote from the very able opinion of the Michigan Supreme Court in this same case, 224 Mich., 480-481; 194 N. W. 1014, 1015:

> "Counsel for the garnishee defendant has filed a persuasive brief in which he urges the point that the railway had done everything it could to make delivery of the apples to the principal defendant before the summons was served upon it . . . . but the Federal Court construction of Section 5, and our own care of *Nessen Lumber Co. vs. Bennett Lumber Co.*, 223 Mich., 349, (193 N. W. 789), forbid our making those facts conclusive of the question of custody and control. It is pointed out in the Federal case cited that the contract between the parties con-

> tinues the railway company as a carrier for 48 hours, after notice is given to the consignee of its arrival, as to the property not already removed within that time. If the position of the railway be that of carrier during the 48-hour period it must follow that it is, during that time, liable as a carrier. If the railway company be liable as carrier it must also follow that the apples remaining in the car before the expiration of that period are within the custody, control and possession of the carrier. We are impressed that under the foregoing construction of Section 5 we must hold that defendant railway had property in its custody and under its control belonging to the principal defendant when the summons was served."
>
> Affirmed on second appeal:
>
> Durham vs. Chicago & Northwestern Railway Company, 201 N. W. 503.

Petitioner cites the Michigan statute of garnishment but has omitted from its brief the recent interpretation and exposition of said statute in the case of:

> Nessen Lumber Co. vs. Bennett Lumber Co. 223 Mich. 349; 193 N. W., 789,

approved and cited in the present case, *supra*, in favor of respondent.

The rights of respondent and the extent of its remedy under said garnishment statute (Sections 13,122, 13,123, Vol. 3, Comp. Laws, 1915) have been settled, and are now at rest.

In *Erie Railroad Company v. Shuart*, 39 *U. S. Sup. Court Rep.*, 519; 250 *U. S.*, 465, the question whether the interstate carriage or transportation of freight had terminated so that the bill of lading and its stipulations had ceased to govern the rights of the parties was decided in

the negative and the liability of the company was determined by and under federal law as applied to the bill of lading.

The shipment was horses. The car containing the horses had arrived at the destination, had been placed on a switch track opposite a cattle chute and left in charge of the consignee for unloading. The chute and car had been connected by the bridge and the consignees were about to lead out four of the horses when the railway employes bunted the car and the injury resulted (Ibd., 466, 467). The bill of lading provided, that in case of claim of injury notice must be given by the shipper or his consignee to the company within five days, and the Court holds the parties are still under and bound by the provisions of the bill of lading and must therefore give such notice. In so holding the Court said: *"We think that giving active charge of removal as agreed was not enough to end the interstate movement. The animals were in the car, no adequate time for removal had transpired. The carrier had not fully performed the services incident to final delivery imposed by law.* These included the furnishing *of a fair opportunity* and proper facilities for safe unloading, although the shippers had contracted to do the actual work of removal" (Ibd., 468). Further facts bearing upon the claimed delivery appear in the dissenting opinion of Mr. Justice Clark, namely, "The journey was ended, *the freight charges paid,* the car placed on the side-track in proper place and position for unloading, approved by consignees *and accepted by two of the co-partnership"* (consignees) (Ibd., 470).

In *Southern Railway Company v. Prescott,* 36 *U. S. Sup. Court Rep.,* 469; 240 *U. S.* 632, *the question to be determined* was whether the carrier's contract under its bill of lading of an interstate shipment of freight, governed by

federal law, had been discharged and a new obligation created as warehouseman governed by local law. This is held to be a Federal question and decided in the negative, that is to say, the liability under the bill of lading had not been discharged.

In that case the freight, consisting of thirteen boxes of shoes had arrived at destination, the consignee had been notified, and he *had paid the freight and receipted for the goods* and removed four of the boxes, when the remaining nine boxes were destroyed by fire which dstroyed the company's warehouse with the contents, after the expiration of the forty-eight hour notice.

As in the case at bar (Rec. 13-14, B-L Sec. 5, Ex. 2). one of the stipulations of the bill of lading was that "property not removed by the party entitled to receive it within 48 hours (exclusive of holidays) after notice of its arrival *might be kept in car, depot or warehouse, subject to reasonable charges for storage and to carrier's responsibility as warehouseman only" (Ibd., 470).

And the Court say, in part: "It is apparent there had been *no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in advance of transportation. The giving a receipt for the goods by the consignee did not alter the fact that they were still held by the railroad company awaiting actual delivery.* The actual *service in holding the goods continued*, and we must look to the bill of lading to determine the legal obligations attaching to that service" (Ibd., 472).

And so it is held that the provisions of the bill of lading govern making the carrier liable as warehouseman only, and therefore only, in case of negligence.

The term "transportation" as defined in the *Carmack Amendment, Section* 1, *Act June* 29, 1906, 34 *Statutes at*

Large 584, "shall include cars and other vehicles and all instrumentalities of shipment or carriage and *all services in connection with* receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported."

Congress in the *Uniform Bill of Lading Act, August* 29, 1916, *Sec.* 23; 39 *Statutes at Large*, 542, recognizes that the surrender of the order bill of lading, is not of itself *a delivery of the goods or of possession* so as to preclude garnishment of the carrier for the goods, for it expressly provides that goods in the possession of the carrier, in case of an order bill of lading *cannot be attached by garnishment* of the carrier, "*unless the bill be first surrendered* to the carrier" and further that "the carrier shall in no such case be compelled *to deliver the actual possession of the goods* until the bill is surrendered or impounded by the Court."

We insist, therefore, that in the case at bar *no actual delivery* of the car load of apples had been made, either of the car with the apples or of the apples in the car. If perchance there was a *constructive* delivery, that does not matter. The fact is the railroad company, garnishee herein, remained and was in possession and control of the car itself, and necessarily of its contents. The car stood upon the railroad company's tracks, it belonged to and was the property of the railroad company, if was subject to be moved and was in fact moved by the railroad company in its switching operations. The property not removed was still in the car and subject to all the liabilities and rights of the railway company under its contract of carriage, and the principal defendant had "access to it only that it might be removed." If, as he says, he locked the car nights, this was not done *until the night after the writ of garnishment was served*, and is, therefore, of no significance and can-

not affect the rights of the plaintiff, and may properly be said to be as much for the protection of the railroad company as of the defendant Larson. And under the bill of lading—the contract of the parties—in the happening of the supposed contingency named in Section 5 of the bill of lading, the apples that remained—not removed—within the 48-hour period, could by the company be "*kept in car*, depot or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or *at the option of the carrier removed to and stored in* a public or licensed warehouse at the cost of the owner," and so within the 48-hour period were necessarily held subject to this right of the company in the event of the happening of this contingency—a right we submit inconsistent with previous *actual delivery to and full possession by Larson.*

Moreover, under the "tariffs, rules and regulations of the Interstate Commerce Commission" (Rec. 3-4), the car and its contents were subject to demurrage charges, after the expiration of the "48 hours' free time for unloading" and so also if stored in carrier's warehouse after this 48-hours' period, and in either case the railroad company had and must have the right to possession and control of the car and its contents until such charges had been paid.

The apples which had been taken and removed by the principal defendant "about one-quarter of the bulk of the apples" (Rec. 21), undisputedly were *delivered* by the garnishee before the service of the writ, but the apples then in the car of the railroad company, on its tracks, moved by it, remained and were "*in its custody*," or, in the language of our garnishment statute "*under its custody and control*" and "*access was only given to it that it might be removed*" by the principal defendant, Larson, and the fact, that the garnishee after the service of the writ did nothing

but to remain passive, that is to say, *knowingly allowed the principal defendant continued access to the car and the apples in the car, that he might remove them from "its custody," whereby they were removed,* clearly is in law and in fact a "delivery" of the apples contrary to the command of the writ. "Delivery" may be made *actively,* as by handing over the property and full possession and control, and putting the party in exclusive possession, or *passively*—but none the less effectively—as by knowingly allowing another (in this case the principal defendant) continued access to the property for the purpose of its removal, whereby it passes into the custody and possession of that other (here the principal defendant).

Counsel's suppositions that if at the moment the writ was served, Larson had brought suit either for the value or the recovery of the property he could not maintain it, because he was then "in the actual possession of the apples" begs the question by assuming he was then in actual possession of the apples. Was he then in actual possession of the *car-load of apples,* or only of the one-fourth part which he had reduced to his actual sole possession by removal? And this supposition of counsel is in direct conflict with the holding of this Court in the *Mark Owen case,* that, "the property here *was not delivered, access was only given to it that it might be removed, it was within the custody of the railroad company.*"

The bill of lading is the contract between the parties, and under that contract the railroad company not only had the right, but it was its duty in case the apples had not been all removed within the 48-hour period, namely, not later than 6 o'clock in the afternoon of October 10th, to close the car and not permit further unloading until the demurrage charges had been paid, by Larson, or in lieu thereof to remove and store the apples either in its own or

some public warehouse, at Larson's expense. How then could the company have and retain possession and custody of the apples after the 48-hour period, if, as contended by counsel, it had *parted with and surrendered actual possession and custody*—made actual delivery—previous to the garnishment?

The rights of the company would seem to negative and be absolutely inconsistent with the claim of the garnishee defendant.

As in the *Shuart case, supra*, the "interstate movement of this freight had not ended, no adequate time for removal had transpired," the "carrier" (in this case the garnishee) "had not fully performed the services incident to final delivery imposed by law."

As in the *Prescott case, supra*, the payment of the freight and receipt for the goods, "did not alter the fact that they were still held by the railroad company awaiting actual delivery. The actual service in holding the goods continued."

As in the *Mark Owen case, supra*, the goods were "held by the carrier during the 48-hour period, as carrier, with all its attendant risks and responsibilities." And, if the company had held them as warehouseman, it would still be subject to the garnishment and be liable accordingly. An attempt by counsel to distinguish the *Mark Owen case*, in the meaning of the word "delivery" as used in that case is not convincing, but confusing. It is "shedding darkness rather than light" upon the subject.

It was the contention of the counsel for the railroad company in that case, as stated in the opinion of Mr. Justice McKenna, "*that where delivery has been made of the property as, it insists, was true in the case at bar*, the responsibility of the railroad company as carrier immediate-

ly ceases. If, however, it is neither delivered nor removed within 48 hours after notice of its arrival, the responsibility of the railroad company thereafter is that of 'warehouseman only'" (Ibd. 556). To this contention the Supreme Court of the State (Illinois) "answered that the bill of lading provides for property 'not removed'—not to property 'delivered' or 'not delivered,' and it must be taken at its word" (Ibd. 556).

As to this distinction of the state court this Court says, "The answer puts *too much emphasis upon the distinction between property removed and property delivered,*" and then meeting the issue squarely and answering the railroad's contention and attempted distinction directly this Court declares, "*The property here was not delivered*"; *clearly* using the word "delivered" in the same sense the railroad company had used the word "delivery" in insisting that "*delivery had been made*"—and then continuing, "*access was only given to it that it might be removed,* and 48 hours was given for that purpose. Pending that time it was within the custody of the railroad company," etc. (Ibd. 556).

How can it be said as does counsel that the *apples* in this case *had been "delivered"* to Larson, and that pending their removal, within the 48-hour period, the apples not removed *were not "in the custody* of the railroad company," and at the same time say, as does this Court in the *Mark Owen case* under precisely like facts, that the *grapes had not been "delivered"* to the consignee, and were "in the custody of the railroad company," as carrier, "pending the 48 hours given for removal"—and after that, of course, as warehouseman?

Would counsel venture to distinguish because in the one case the freight was *apples* and in the other *grapes?*

To insist and urge as does counsel, "The garnishee must

not only have actual possession of the defendant's property, but there must be privity between him and defendant both of contract and of interest, by which the defendant would have a right of action or an equitable claim against the garnishee to recover the property for his own use either at the present or some future time" if correct (and to this proposition there is at least the exception, created by statute, that a creditor may reach propery by garnishment in the possession of the garnishee under a transfer made in fraud of creditors that the defendant himself could not reach or recover) does not militate against plaintiff's claim, for the reason that there is privity between the garnishee and the principal defendant as to this shipment of apples, and the sole question is the "possession" or "custody" or "control" of the apples not removed at the time the writ was served.

So likewise as to counsel's proposition, "The liability of a garnishee in respect of property of the defendant in his hands is to be determined ordinarily by his *accountability to the defendant*, on account of the property"; and for that very reason the decision in the *Mark Owen Co. case, supra*, is directly in point for plaintiff, respondent, for under like facts and circumstances to those in the case at bar, that case expressly holds the Railway Company *accountable to defendant* for the safe keeping and custody of the property and as carrier; and further, that there had been no "pre-existing contract" by which "that accountability" has been removed or modified.

Nor has counsel's further proposition any application to the case at bar, namely—"In order to charge the garnishee as debtor of the defendant, the defendant shall have a cause of action against the garnishee"—for the plaintiff, respondent, is not seeking here to charge the garnishee, petitioner, as debtor or for any indebtedness whatsoever, but, as

above stated, with the "possession" and "custody" of the property of the defendant. That the apples were the property of defendant is established, the sole question then is "possession" or "custody" or "control" of the property by the garnishee, petitioner herein, and for the purposes of this case it would make no difference whether that possession was rightful or wrongful, with or without "privity" (though in fact, it was both rightful and with privity).

The railroad company, garnishee defendant, petitioner in the instant case had made no delivery of the apples, that had not been made by the railroad company of the grapes in the *Mark Owen case*, and pending the removal of the apples within the 48-hour period the apples were "in the custody of the railroad company" *to the same extent and in the same way as were the grapes* "in the custody of the railroad company" in the *Mark Owen case;* and, if the apples were "in the custody of the railroad company" in this case, then the company was necessarily subject to garnishment therefor, and upon being garnished it became and was the duty of the railroad company to retain them *"in its custody"* until discharged by law. This it did not do.

> "As soon as the process is served on the garnishee, he has *active* duties to perform. He must impound the property in his possession or the debt owed by him to satisfy any judgment the plaintiff may recover, and he cannot escape liability to the plaintiff therefor, by allowing it to be subsequently removed from his control. If, after he is served with process, any one attempts to take the property or recover the debt from him by legal process, it is his duty to exhaust all authorized means to prevent it."
>
> Rood on Garnishment, Sec. 183.
>
> "The garnishee cannot escape liability to the plaintiff therefor by afterwards delivering or pay-

> ing it to the defendant or anyone else, *or allowing it to escape his control*, even though taken by an adverse claimant by virtue of legal process, unless he has exhausted all legal means to prevent it, and without avail."
>
> Rood on Garnishment, Sec. 192.

No one can be held liable as a trespasser while performing a duty imposed on him by law in obedience of a lawful command.

C.

Counsel's argument of inconvenience—"*ab inconvenienti*", cannot avail and is not new.

The same argument was urged at as great length and with as much force, upon this Court, but without avail in the Mark Owen case. Counsel for the Railroad Company in that case, on page 34 of their brief, under "Conclusion", say:

> "The amount involved in this case is insignificant, but the principle on which the judgment of the state courts is based is of vital importance, and on its final determination will depend the liability in a great number of similar claims. Also, if the decision of the Supreme Court of Illinois is to stand, the practice now followed by petitioner on its various team tracks will have to be entirely changed and the same will also be true of other carriers under like circumstances. Not only will a common carrier be called upon to perform the duty it contracts to perform, but it will also be called upon to perform an additional duty, if the inability of a consignee to unload makes the performance of such a duty necessary. It will also not only be called upon to insure the honesty of its own employees over which it has, theoretically at least, some jurisdiction, but will also be called upon to insure the honesty of employees of consignees over which employ-

> ees it has no jurisdiction whatsoever. We do not believe the law and the language of that provision of the bills of lading now in question, can be so twisted as to bring about this result. The burden of a common carrier is indeed great, but there is certainly a limit to it somewhere and we submit that that limit has been reached, when, as in this case, a consignee, by its own action, entirely relieves a carrier from any obligation to perform any duty whatsoever with reference to a shipment. We cannot understand the justice of the position of the respondent here in first assuming sole control over this property and thereafter requiring petitioner to make good losses which may have occurred as a result of the inefficiency or dishonesty of its own employees."

As previously pointed out, "Congress in the *Uniform Bill of Lading Act, August* 29, 1916, *Sec.* 23, 39 *Statutes at Large,* 542, *recognizes that the surrender* of an order bill of lading, is not of itself a *delivery of the goods or of possession* so as to preclude garnishment of the carrier for the goods, for it expressly provides that goods in the possession of the carrier in case of an order bill of lading *cannot be attached by garnishment of the carrier 'unless the bill be first surrendered to the carrier'* and further that 'the carrier shall in no such case be compelled to *deliver the actual possession of the goods* until the bill is surrendered or impounded by the court' ", and the argument or consideration of the inconvenience did not avail with Congress, much less can it avail with the court.

See:

> Davis vs. Railway Co., 217 U. S. 157; 54 L. Ed. 708.
>
> Endicott-Johnson Corp. v. Encyclopedia Press, 45 Sup. Ct. Rep. 61-63 (4).

"No peculiarity of state procedure will be permitted to

enlarge or to abridge a *substantive* federal right."

State of Missouri ex rel., St. Louis Ry. Co. vs. Taylor, 45 Sup. Ct. Rep. 47.

Further, and finally, the identical issues presented here for review, have been three times before submitted to the Michigan Supreme Court on the same record of facts and authority, and after careful consideration, have been three times adjudicated by said court adversely to the garnishee defendant-petitioner and its present contentions.

224 Mich. 477, 194 N. W., 1014;
201 N. W. 503.

A petition for re-hearing of the first decision reported as above, was applied for, and supported in a brief filed by counsel for petitioner herein, and later denied by the court.

We respectfully submit that this Honorable Court deny the petition for certiorari, terminating this prolonged litigation, already well and thoroughly disposed of by the Michigan Supreme Court as well this Honorable Court, in the Mark Owen case.

Respectfully submitted,

JULIUS J. PATEK,
Counsel for Respondent,
Alvin R. Durham Company.

MYRON H. WALKER,
SOLOMON W. PATEK,
Of Counsel.

FROOF OF SERVICE

State of Michigan, }
County of Gogebic. } ss.

Solomon W. Patek, being duly sworn, deposes and says that he is of counsel for the respondent, Alvin R. Durham Company, in the within cause; that on the_____day of February, 1925, two (2) copies of the annexed and foregoing "Objection to Petition for Writ of Certiorari to the Supreme Court of Michigan, with Statement of Facts and Argument" in the therein entitled cause of Chicago & Northwestern Railway Company, petitioner, versus Alvin R. Durham Company, et al., respondents, were served upon each, R. N. Van Doren and Frank A. Bell, counsel for petitioner, by registered mail (return receipt requested), by depositing the same in the United States post-office in the City of Ironwood, Michigan, securely sealed in envelopes properly addressed respectively, " 'R. N. Van Doren, Esq., General Offices, Chicago & Northwestern Railway Company, 226 W. Jackson Blvd., Chicago Illinois' and 'Frank A. Bell, Esq., Attorney-at-Law, Negaunee, Michigan' ", and that affixed to each said envelope and contents was the full postage required by the postal regulations for the proper transmission thereof from said Ironwood, Michigan, to said Chicago, Illinois, and said Negaunee, Michigan, respectively; that said Ironwood, Michigan is less than 500 miles distant from said Chicago, Illinois, and less than 200 miles distant from said Negaunee, Michigan.

_____

Subscribed and sworn to before me this_____day of February, 1925.

_____

Notary Public, Gogebic County, Michigan.
My commission expires July 13, 1927.

County of Gogebic. }
State of Michigan, } ss.

I, John Luxmore, Jr., Clerk of said county, and of the Circuit Court for said County of Gogebic, being a court of record having a seal, do hereby certify that Louis J. Patek, whose name is subscribed to the foregoing Proof of Service, was, at the time of taking such proof, a notary public in and for said county, duly commissioned and qualified, and authorized to take the same. Further, that I am well acquainted with the hand writing of said notary public, and verily believe that his signature to said proof is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Bessemer, in said county, this_____ day of February, 1925.

_____

Clerk.

FILED
SEP 14 19
WM. R. STANS

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 257

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

ALVIN R. DURHAM COMPANY, AND FRED S. LARSON, ALIAS FRED M. LARSON,

Respondents.

MOTION TO DISMISS WRIT OF CERTIORARI

and

TO AFFIRM JUDGMENT,

WITH ARGUMENT

JULIUS J. PATEK,
Counsel for Respondent,
Alvin R. Durham Company.

SOLOMON W. PATEK,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 257

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

ALVIN R. DURHAM COMPANY, ET AL.,
Respondents.

NOTICE OF HEARING MOTION TO DISMISS WRIT OF CERTIORARI and TO AFFIRM JUDGMENT

To Chicago & Northwestern Railway Company, Petitioner, and R. N. Van Doren and Frank A. Bell, its Counsel:

Please take notice that on Monday, the 19th day of October, 1925, upon the opening of Court, or as soon thereafter as counsel can be heard, at the court room of the Supreme Court of the United States in the Capitol Building, Washington, D. C., the foregoing *Motion to Dismiss Writ of Certtorari and to Affirm the Judgment of the Michigan Supreme Court,* in said cause, will come on to be heard before

said Court, pursuant to said motion and upon the argument in support thereof.

ALVIN R. DURHAM COMPANY, Respondent,

By Julius J. Patek

JULIUS J. PATEK, *Its Counsel.*

SOLOMON W. PATEK,
Of Counsel.

Dated September 8th, 1925.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 257

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

ALVIN R. DURHAM COMPANY, ET AL.,
Respondents.

MOTION TO DISMISS WRIT OF CERTIORARI
and
TO AFFIRM JUDGMENT

And now comes said respondent, Alvin R. Durham Company, by its Counsel and moves this Honorable Court now here to dismiss the Writ of Certiorari heretofore and on the 25th day of May, 1925, issued herein, for the following reasons, namely:

First: Because as appears by the Transcript of Record now on file herein, this Court was induced to grant the petition for said Writ and to cause the same to be issued, by and upon an erroneous and misleading statement of material facts made and contained in said Petition and Brief in support thereof.

Second: Because as now appears, except therefor, said Writ would not have been granted.

And as an alternative thereto, this respondent by its Counsel further moves this Honorable Court now here that the judgment of the Supreme Court of the State of Michigan in favor of this respondent and against said petitioner as garnishee, may be affirmed, because,

First: It is manifest that the Writ was taken for delay only;

Second: The questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

This motion is based on the records and files of said cause.

Julius J. Patek,
Counsel for Respondent, Alvin R. Durham Company,
Business Address: Ironwood, Michigan.

Solomon W. Patek, Of Counsel.
Dated September 8th, 1925.

STATEMENT OF FACTS AND ARGUMENT

The principal statements and assertions made in the Petition and Brief in Support, that are unwarranted and misleading as to material and important facts, are the following:

1. The Petition for the writ states that:

> "At about 8 o'clock that same morning the defendant commenced unloading the apples from the car and at nine forty-five that morning the writ of garnishment was served on the garnishee's agent (Trans. 23). In the meantime the defendant had gone to the car with a drayman and an automobile truck; *they entered the car,* put the apples in the baskets and carried them out. *Defendant was in the car from the time they opened it until the summons* (writ in garnishment) *was served* (Trans. 8), and during that time 8:20 to 9:45 defendant had unloaded one-quarter of the bulk of the apples". (Petition page 3).

We submit that the statements which we have italicised and quoted, namely, that *"they entered the car"*, and that, *"defendant was in the car* from the time they opened it until the summons *was served"*, are unsupported by the record and gross misconstructions if not bald mis-statements of the record and the fact.

2. Counsel in their "Brief" page 15, assert:

> "The defendant (notify party) *was personally in the car superintending the unloading* and had unloaded about one-fourth of the bulk of the apples when the garnishee summons in this case *was served* ....., (Trans. 23)."

And we submit that the statement which we have italicised and quoted, namely, *"The defendant was personally in the car"*, is entirely unwarranted by the record and con-

trary to the record and the fact. It is evident that Counsel for Petitioner deem these challenged statements of fact to be material if not vital to the case of Petitioner, as they re-iterated these statements and urged same three times before the Michigan Supreme Court, but without avail.

The fact in regard to these claims of the Petition and Brief as shown by the record, are plain. It is as follows:

The defendant Larson after surrendering the bill of lading, paying the freight and giving receipt, "hired a drayman with an automobile truck" (Trans. 4, fol. 8*) went to the car then on a "public delivery track" of the railroad company (Trans. 2, fol. 4), and as defendant testifies, "We put them" (apples) "in baskets and carried them out" (Trans. 4, fol. 8); "I was there from the time we opened the car until the summons was served" (Trans. 4, fol. 8), "I wasn't there all the time while they were moving the apples", (Trans. 4, fol. 8).

This then is the foundation (?) for the assertions of the Petition and Brief, that we have italicised and quoted, and we submit that there is no foundation or excuse for such assertions.

Moreover, the testimony tends strongly to show, if it does not establish the fact, that "*in the meantime*" the car was switched or shunted by the railroad company in order to place another car ahead of it. And it is undisputed that while the car was being unloaded it was so switched several hundred feet. (Trans. 4, fol. 8; 5, fol. 9; also Ex. 1, Trans. 7, fol. 13). It was switched or shifted one or more times after the unloading was begun and on each occasion as will appear from the map, said Exhibit "1", it must have been moved beyond the switch some 500 feet from where

*These references to "Trans." are to the pages of the Transcript of Record printed by the Clerk of this Court, and now on file herein, being cause No. 257, October Term, 1925).

it had been previously placed for unloading, and the unloading had to be discontinued or abandoned during such switching operations (Trans. 14, fol. 26). Larson testifies, "I know it was shifted around during the time it was there" (on the "public delivery track") (Trans. 4, fol. 8). The station agent Shove, testified: "It must have been moved after they started to unload the apples", (Trans. 5, fol. 9). And again, "Sometime between 8 and 9 in the morning it was moved a little easterly", (Trans. 13, fol. 25); this was after it was "first placed at the final end" of the track (Trans. 13, fol. 25), and they started to unload, "about 8:20 in the morning" (Trans. 25, fol. 26), and when the car was switched the truck could not follow and the unloading would have to stop (Trans. 14, fol. 26). Beside, this was a *carload of "bulk apples"*, (Trans. 8, fol. 15; 12, fol. 23), and when the "summons was served", it is stipulated that, "three-fourths of the car load of apples" were "in dispute", (Trans. 2, fol. 5), that is to say, were still in the car unloaded. (Trans. 12, fol. 23).

Beyond a peradventure then, under these conditions it was impossible for the defendant and his drayman, ("they") to have "entered the car", and likewise impossible for the defendant Larson to have been "personally in the car" either "from the time they opened it" or "until the summons was served", as solemnly asserted by Counsel. When "they opened it" *the car was full of "bulk apples"*, when the "summons was served" *it was three-fourths full of "bulk apples"*.

Where then was the room for defendant and his man in the car? Will Counsel say *"Between the apples and the roof of the car"?* And when the car was switched or "shifted" and the car closed, where was defendant then? Was he still maintaining "possession" at risk of life and limb? Who then was "in control and possession" of the

car and its contents if not the Garnishee? And so it was and remained at the time "the summons was served".

This Court also will search the entire record in vain for as much as a scintilla of evidence which sustains Counsel's assertion (Brief page 15) that Larson was personally "in the car" superintending the unloading. The fact is that the car was at first full of *loose* (bulk) apples and three-fourths full at the time of the service of the writ and it was a physical impossibility for either, Larson, or any of his assistants to be "in the car" at the time or previous to the service of the writ unless they squeezed themselves in between the contents of this box car, (24,000 pounds of bulk apples) and the ceiling of such car.

3. Again Counsel assert, "The party named in the bill of lading as the one to be notified—*took possession of the car*", (Brief, page 15) and refer to "Trans. 22-23". But the reference does not warrant the assertion. Included by Mr. Bell the attorney for garnishee in his claim of the facts before the trial court, namely: "Possession of the car was immediately given him" (Trans. 23), it was immediately challenged and disagreed to by plaintiff's attorney, who said: "We accept Mr. Bell's statement as correct except where he reaches the conclusions—that the car or the apples were delivered to Larson or were in the possession of Larson at the time of the making the affidavit or the service of the writ." Trans. 12, fol. 24).

Notwithstanding, Counsel still assert as a proven fact, that which was expressly challenged and is in dispute, and is perhaps the vital issue of fact in the case.

We submit then upon these vital questions—to the contrary of Counsel's unfounded assertions—that there was no actual or physical possession of the car or of the apples in the car in the defendant at the time the summons was

served. The car and the apples in the car remained and were for all practical intents and purposes actually "in the possession and under the control" of the garnishee, and the apples therefore subject to the writ of garnishment when served.

That, as to the apples in the car, there was *no delivery, but only a right of access given to it in order that it might be removed.* (Michigan Central Railway Company vs. Mark Owen Co. 41 Sup. Ct. Rep. 554; 256 U. S. 427.) This "right of access" thus "given to it" was a *mere* license revocable at any time by the garnishee, *certainly for cause such as service of process of garnishment;* and from such time defendant Larson would become *a trespasser.*

We respectfully ask therefore that the Writ, as we think will now appear was granted upon a misapprehension of the facts, be dismissed, and as an alternative thereto, that the judgment and determination of the Michigan Supreme Court be affirmed, with costs.

Respectfully submitted,

Julius J. Patek,
Counsel for Respondent Alvin R. Durham Company.

Solomon W. Patek, Of Counsel.

PROOF OF SERVICE

State of Michigan, }
County of Gogebic. } ss.

Solomon W. Patek, being duly sworn, deposes and says that he is of counsel for the respondent, Alvin R. Durham Company, in the within cause; that on the.....day of September, 1925, two copies of the ennexed and foregoing "Motion to Dismiss Writ of Certiorari and To Affirm Judgment" and "Notice of Hearing" thereof in the therein entitled cause of Chicago & Northwestern Railway Company, petitioner vs. Alvin R. Durham Company, et al., respondents, were served upon each, R. N. Van Doren and Frank A. Bell, counsel for petitioner, by registered mail (return receipt requested), by depositing the same in the U. S. Postoffice in the city of Ironwood, Michigan, securely sealed in envelopes properly addressed respectively, "'R. N. Van Doren, Esq.' General Offices, Chicago & Northwestern Railway Company, 226 W. Jackson Blvd., Chicago, Illinois, and 'Frank A. Bell, Esq.,' Negaunee, Michigan," and that affixed to each said envelopes and contents was the full postage required by the postal regulations for the proper transmission of each said envelopes and contents as aforesaid, from said Ironwood, Michigan, to Chicago, Illinois, and Negaunee, Michigan, respectively, to each of the addresses above named; that said Ironwood, Michigan, is less than 500 miles distant from said Chicago, Illinois, and Negaunee, Michigan.

Subscribed and sworn to before me this_____day of September, 1925.

Notary Public, Gogebic County, Michigan.
My Commission expires July 13th, 1927.

State of Michigan, }
County of Gogebic. } ss.

I, John Luxmore, Jr., Clerk of said county, and of the Circuit Court of said County of Gogebic, being a court of record having a seal, do hereby certify that Louis J. Patek, whose name is subscribed to the foregoing Proof of Service, was, at the time of taking such proof, a notary public in and for said county, duly commissioned and qualified, and authorized to take the same. Further, that I am well acquainted with the hand writing of said notary public, and verily believe that his signature to said proof is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at the City of Bessemer, in said county, this_____day of September, 1925.

_____Clerk.